STATE OF CALIFORNIA GRAY DAVIS, *GOVERNOR*

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
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November 12, 2003

Paul B. Priest, Vice President
Employee Labor Relations and
HR Compliance
MidAmerican Energy Holdings Company
P.O. Box 657
Des Moines, IA 50303-0657

Re: Public Works Case No. 2002-043
Maintenance, Renewable Energy Resources

Dear Mr. Priest:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced work under California's prevailing wage laws and is made pursuant to Title 8, California Code of Regulations, section 16001(a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that maintenance work performed on an eligible renewable energy resource receiving incentive payments or supplemental energy payments pursuant to Public Utilities Code ("PU Code") section 383.5 is not "public works" subject to the payment of prevailing wages.

Background

On September 12, 2002, Governor Gray Davis signed Senate Bill 1078 into law, effective January 1, 2003. Among other things, Senate Bill 1078 required the application of prevailing wage laws to certain work performed on eligible renewable energy resources receiving production incentives or supplemental energy payments pursuant to PU Code section 383.5. This requirement was codified in PU Code section 399.14(h), which states:

> Construction, alteration, demolition, installation, and repair work on an eligible renewable energy resource that receives production incentives or supplemental energy payments pursuant to Section 383.5 including, but not limited to, work performed to qualify (sic), receive, or maintain production incentives or supplemental energy payments is "public works" for the purposes of Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 of the Labor Code.

On April 10, 2003, the Department issued a precedential public works coverage determination that *construction* of the Salton Sea 6 Geothermal Power Plant is a public works. Under the Labor

Code, public works are subject to the payment of prevailing wages. An administrative appeal of the determination was denied on June 26, 2003. (See, Decision on Administrative Appeal Re: *Salton Sea 6 Geothermal Power Plant Project/Imperial County, PW 2002-043 (June 26, 2003).)* The Decision on Administrative Appeal indicated that the question raised by the requesting party as to whether maintenance work on an eligible renewable energy resource receiving incentive payments or supplemental energy payments pursuant to PU Code section 383.5 requires the payment of prevailing wages would be the subject of a separate request for determination. This determination addresses that inquiry.

Under Labor Code section 1720(a)(1), "public works" means . . . "[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds ... ." Under Labor Code section 1771, contracts let for maintenance are subject to the payment of prevailing wages. "Maintenance" is defined, in relevant part, in Title 8, California Code of Regulations, section 16000, to include:

> (1) Routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired.
>
> (2) Carpentry, electrical, plumbing, glazing, touchup painting, and other craft work designed to preserve the publicly owned or publicly operated facility in a safe, efficient and continuously usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures.

Discussion

1. Under the plain meaning rule, maintenance is not included as "public works" in PU Code section 399.14(h).

PU Code section 399.14(h) tracks the principal language of Labor Code section 1720(a)(1)[1], which lists types of work that are

[1] "As used in this chapter, 'public works' means: Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds ... ."

"public works." However, the word "maintenance," which is subject to the payment of prevailing wages under Labor Code section 1771, is absent from the enumeration of types of work that are listed as "public works" in PU Code section 399.14(h).

The question raised is whether maintenance work on an eligible renewable energy resource receiving the above-described payments is "public work."

Requesting party urges this question should be answered in the negative on the basis of a reading of the plain language of PU Code section 399.14(h). It is requesting party's view that the exclusion of the word "maintenance" from the types of work listed as "public works" in that statutory section reflects an intentional decision by the Legislature. The State Building and Construction Trades Council ("SBCTC"), however, contends that maintenance is public work under PU Code section 399.14(h). Its reasoning appears to be that the Labor Code includes maintenance as a type of public work, and when the Legislature did not specifically exclude such work from PU Code section 399.14(h), it must be presumed to have understood that Section 399.14(h) would include all the types of work listed as public work under the Labor Code.

When a statute is unambiguous on its face, courts look to the "plain meaning" of the statute. Courts consult the words themselves, giving them their usual and ordinary meaning. *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, 1588. When a statute is clear and not unreasonable or illogical in its operation, a court may not go outside the statute to give it a different meaning (2A Singer, Statutes and Statutory Construction (6th ed. 2000) Plain Meaning Rule, § 46:01, pp. 113-118).

> Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion . . . . When the intention of the Legislature is so apparent from the face of the statute that there can be no question as to its meaning, there is no room for construction ... . It is not allowable to interpret what has no need of interpretation ... . There is no safer nor better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses ... . The rules of statutory construction favor according statutes with their plain and obvious meaning, and therefore one must assume that the Legislature knew the plain and

> ordinary meanings of the words it chose to include in the statute. Singer, at 118-124. There is generally an inference that omissions are intentional. This rule is based on logic and common sense. It expresses the concept that when people say one thing they do not mean something else. Singer, at 327.

PU Code section 399.14(h) does not list the word "maintenance" as a type of public work. This is consistent with the language of Labor Code section 1720(a)(1), which also does not include the word "maintenance." The analysis is not, as SBCTC argues, whether the Legislature intended to exclude maintenance; it is whether the Legislature *included* maintenance as public works. Had the Legislature wished to include maintenance, it could have included the single word or imported the relevant language of Labor Code section 1771 to PU Code section 399.14(h). The Legislature is presumed to have been aware of the statutory scheme, the regulations and the Department's precedential decisions[2] on maintenance work. It is therefore concluded that, despite this awareness, the Legislature nevertheless refrained from including "maintenance" in PU Code section 399.14(h) and intended that maintenance work performed on an eligible renewable energy resource receiving incentive payments from the California Energy Commission is not a public works. The plain language of PU Code section 399.14(h) supports this interpretation.

2. The phrase, "work performed to ... maintain" is not interpreted as including maintenance as public works.

SBCTC argues that the phrase in PU Code section 399.14(h), "including, but not limited to, work performed to qualify (sic), receive or maintain production incentives or supplemental energy payments" necessarily includes maintenance work because maintenance is necessary to ensure a facility continues to operate, and the continued operation of a facility is necessary to maintain production incentives or supplemental energy payments. SBCTC reasons that the words "including, but not limited to" indicate legislative intent to broaden the activities covered by the prevailing wage law, not limit them.

As asserted by the requesting party, such a position is directly contrary to the statutory interpretation doctrine, *ejusdem generis*, which provides that where general words follow the

[2] For example, *Carson Ice-Gen Project/Central Valley Financing Authority and Carson Energy Group*, PW 94-031 (September 28, 1994); *Maintenance and Repair Work at Commerce-to-Refuse Energy Facility/County Sanitation District No. 2, Los Angeles County*, PW 2001-032 (October 9, 2001).

enumeration of particular classes of things, the general words will be construed as applicable only to things of the same general nature or class as those specifically enumerated. Black's Law Dictionary (1999) 7th edition. *In Re Johnny O.* (2003) 107 Cal.App.4th 888, 894, *Atlantic Mutual Ins. Co. v. J. Lamb, Inc.* (2002) 100 Cal.App.4th 1017, 1036 (n. 15), Singer, at 273-274. It is assumed that things of a higher order are named at the beginning of an enumeration. If not so named they are intended to be excluded from the statute. (Singer, at 292).

In PU Code section 399.14(h), the Legislature specifically listed "construction, alteration, demolition, installation and repair work" as the classes of work that are public works. The phrase, "including, but not limited to, work performed to qualify (sic), receive, or maintain production incentives" follows these higher enumerated categories of work. Under the doctrine of *ejusdem generis*, the latter phrase would be applicable only to the categories of work of the same general nature or class as those enumerated as public works. Adopting SBCTC's analysis would render meaningless the general enumeration of types of work and the specific omission of "maintenance," as any type of work would be public works so long as it was performed to "qualify (sic), receive, or maintain production incentives." As such, this latter phrase does not stand alone nor expand the earlier listed types of work so as to include maintenance.

Finally, SBCTC urges that inclusion of maintenance work within the definition of public work is consistent with the overall purpose of the prevailing wage laws articulated in *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987. While courts will liberally construe prevailing wage statutes to further the purposes of the law, they cannot interfere where, as here, the Legislature has demonstrated the ability to make its intent clear and chosen not to act. *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, 1589.

Based on the foregoing, maintenance work on an eligible renewable energy resource receiving production incentives or supplemental energy payments pursuant to PU Code section 399.14(h) is not a "public works."

I hope this determination satisfactorily answers your inquiry.

Sincerely,

Chuck Cake

Chuck Cake
Acting Director